Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

Civil No. 75-742

FIRST AMERICAN BANK & TRUST COMPANY, a Domestic Corporation, ROBERT M. HART, ROBERT N. CAMPBELL, LARRY SANDERS, HARVEY W. BOEN, ALBERT W. FETZER, RUTH M. HART, BERNARD H. HILLYER, ARNE J. SPRINGAN, JOHN F. SULLIVAN, CHARLES L. WELCH,
Petitioners,

vs.

G. W. ELLWEIN, State Examiner and Commissioner, Department of Banking and Financial Institutions; THE STATE BANKING BOARD and VICTOR ABRAHAM, Bank Examiner, All of the State of North Dakota,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did petitioners, freely and without reservation, submit to and litigate in the North Dakota state courts the federal constitutional questions which they now seek to litigate before the Three-Judge United States District Court?

STATUTORY PROVISIONS INVOLVED

28 United States Code Section 2281

28 U.S.C. Sec. 2281—Injunction against enforcement of State Statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

28 United States Code Section 2284

28 U.S.C. Sec. 2284—Three-judge district court; composition; procedure.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days' notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before the final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in each State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub. L. 86-507, § 1(19), 74 Stat. 201.

STATEMENT OF THE CASE

This is an action commenced by the plaintiffs by the filing of the Complaint in the office of the Clerk on January 17, 1975. Plaintiffs requested that a Three-Judge District Court be convened and that the defendants, "their employees, agents, successors and others acting in concert with them," be preliminarily and permanently enjoined from enforcing any actions taken by them pursuant to the statutory scheme of North Dakota and for a declaration that Sections 6-01-01, 6-01-03, and 6-01-09 North Dakota Century Code are unconstitutional, or in the alternative that the exercise of authority by the defendants pursuant to the statutes was unconstitutional. At the same time, the plaintiffs applied for a Temporary Restraining Order against the defendants. On the 17th day of January, 1975, in the District Court, the Honorable Bruce Van Sickle granted the Temporary Restraining Order. This order was granted ex parte and no return day was fixed. On the 21st day of January, the defendants served the adverse parties with a Notice of Motion to Dissolve the Temporary Restraining Order and set the same for hearing on January 24, 1975, in the United States Courthouse in Bismarck, North Dakota. Following the hearing, defendants' application was denied by the single District Judge under date

of January 27, 1975, and the defendants thereupon appealed to the court of appeals. The court of appeals set aside the Order of the District Court issued on the 27th day of January, 1975, and set the Motion to Dismiss and to Dissolve the Temporary Restraining Order for hearing before a Three-Judge Court as soon as possible. This order was dated February 6, 1975.

Thereafter, the defendants filed another Motion to Dismiss and the Motions came on for hearing before the Three-Judge Court in the United States Courthouse in Fargo, North Dakota, on February 20, 1975. Thereafter, the Three-Judge Court filed a Memorandum and Order of Dismissal dated February 27, 1975, filed March 4, 1975. The court held that all of the constitutional issues presented by the record in the case sub judice had been litigated in the state courts and thus there was no substantial federal constitutional question presented for the determination by the Three-Judge Court, ergo the Three-Judge Court had no jurisdiction. (A 1-12) Upon this Memorandum and Order a Judgment of Dismissal was signed by Judge Van Sickle on March 6, 1975, (A 11-12) and on the same day filed in the office of the Clerk of the District Court.

The plaintiffs thereafter filed a Notice of Appeal to the Supreme Court of the United States and with the Notice filed an Application for a Temporary Restraining Order. This Notice of Appeal was later withdrawn. By Notice dated the 25th day of March, 1975, the plaintiffs filed a Notice of Appeal to the court of appeals. (A 19) An Application was made for a Stay Pending Appeal. The Application for Stay was denied. The court of appeals affirmed. Its opinion was filed July 30, 1975. (A 14)

The First American Bank & Trust Company and other petitioners seek a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

REASONS WRIT SHOULD BE DENIED

In the abstention case, *First American Bank & Trust Company, et al., Plaintiffs-Appellants v. G. W. Ellwein, et al.*, 474 F. 2d 933 (8th Cir., 1973), the plaintiffs-petitioners alleged in their complaint that they were denied due process of law in the state court proceedings, and hence were entitled to relief in the federal courts. The Court of Appeals of the Eighth Circuit by opinion filed February 27, 1973, affirmed the decision of the district court invoking abstention and noted: (*First American Bank & Trust Company v. Ellwein*, 474 F. 2d 933 at 935 (8th Cir., 1974))

> "The matters presented to the federal court are now in the state courts, and their determination of the 'fairness of hearing' issue may well eliminate the need for any consideration of constitutional issues by the federal judiciary."[4]
>
> "[4] At oral argument the parties conceded that the question of competency of the Board and its right to proceed under the circumstances has been preserved in the record of the administrative hearing and can be presented to the North Dakota courts."

On June 28, 1974 the North Dakota Supreme Court finally decided the state case on the merits adverse the petitioners. *First American Bank & Trust Company v. Ellwein*, 221 NW 2d 509 (ND 1974), Petitioners petitioned for Writ of Certiorari to the Supreme Court of North Dakota. In that petition it was recited (A 17-18):

> "Constitutional and due process questions (were) first raised in written response to Complaint of State Banking Board and its Notice of Hearing . . .; secondly, in opening statement at time of purported 'hearing', June 19, 1972 . . .; thirdly, on appeal to the State District Court . . .; and lastly to State Supreme Court in Petitioners' (Appel-

lees) Brief and Petition for Rehearing . . . (petition for Writ of Certiorari at 14, *First American Bank & Trust Company v. Ellwein*, No. 74-187 (U.S.S.Ct.))1."

The petition was denied.

CONCLUSION

The petitioners, freely and without reservation, litigated federal constitutional questions in the state courts. The record is clear. In the abstention case in the court of appeals, the petitioners conceded that the federal constitutional questions had been preserved in the record in the state courts to be presented to the North Dakota state courts. After an adverse decision in the state courts and in its previous petition to this court, it was conceded, indeed, asserted, that the constitutional questions had been litigated in all stages of the proceedings in the North Dakota courts.

The writ should be denied. *England et al. v. Louisiana Board of Medical Examiners*, 475 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (January 1964).

Dated this 10th day of December, 1975.

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